No. 83-2082

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL ALAN CROOKER,
Petitioner,

v.

UNITED STATES PAROLE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION

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Now that respondent has changed its position on the central legal issue presented by this case, petitioner Michael Alan Crooker urges this Court to grant his petition for a writ of certiorari, to vacate the judgment below summarily, and to remand this case to the United States Court of Appeals for the First Circuit for further proceedings.

STATEMENT

Petitioner brought this action under the Freedom of Information Act ("FOIA") to obtain a copy of his presentence report which is in the possession of the respondent United States Parole Commission. Although petitioner has twice seen his entire presentence report, first pursuant to Rule 32(c) of the Fed. R. Crim. P., in connection with his original sentencing, and subsequently pursuant to 18 U.S.C. § 4208, in connection with a parole proceeding, he has not been permitted to keep a copy of it. However, under the FOIA, a requester is entitled to a copy of any agency record which is not exempt from disclosure. 5 U.S.C. § 552.

The United States Court of Appeals for the First Circuit held that petitioner was not entitled to a copy of his presentence report solely on the ground that the report is not an "agency record" within the meaning of the jurisdictional provision of the FOIA, 5 U.S.C. § 552(a)(4)(B). (App. 18a). According to the First Circuit, despite the Parole Commission's possession and use of presentence reports, they remain court documents, which fall outside the reach of the FOIA. (App. 11a). As to certain of petitioner's medical records, the court vacated the district court's decision and remanded the case for further proceedings. (App. 20a).

Petitioner then sought certiorari, pointing to a conflict in the circuits over whether presentence reports are "agency records." (Petition at 7-9). In addition to the conflicts cited in his petition, there are two recent decisions by the Ninth and Eleventh Circuits which address this issue. The District of Columbia and Ninth Circuits have held that presentence reports are "agency records," *Carson v. Department of Justice*, 631 F.2d 1008 (D.C. Cir. 1980); *Lykins v. Department of Justice*, 725 F.2d 1455 (D.C. Cir.

1984); *Berry v. Department of Justice*, 733 F.2d 1343 (9th Cir. 1984), while the Tenth and Second Circuits, in addition to the First Circuit, have concluded that presentence reports are not "agency records" under the FOIA, *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968) (*per curiam*), *cited with approval in United States v. Dingle*, 546 F.2d 1378 (10th Cir. 1976); *United States v. Charmer Industries*, 711 F.2d 1164, 1170 n. 6 (2d Cir. 1983), and the Eleventh Circuit has ruled that the same reports, while in the possession of the Bureau of Prisons, are not agency records. *Lindsey v. Bureau of Prisons*, 736 F.2d 1462 (11th Cir. 1984), *petition for cert. pending*, No. 84-5412.

In his opposition, the Solicitor General now concedes that a presentence report in the possession of the Parole Commission is an "agency record" subject to the disclosure requirements of the FOIA, *i.e.*, that a copy must be provided to the petitioner unless one or more of the Act's nine exemptions allow the Commission to withhold the report. Opposition at 7. Moreover, the Solicitor General has represented that the Parole Commission will no longer rely on the argument that such reports are not agency records as a basis for withholding in the future. *Id.* However, despite his concession that the legal theory that the respondent argued and the First Circuit adopted below is in error, the Solicitor General nonetheless takes the position that certiorari should be denied and that petitioner should be denied any relief whatsoever on the ground that he has "no need to obtain a copy of his presentence report." Opposition at 8.

THE PETITION SHOULD BE GRANTED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS IN LIGHT OF THE RESPONDENT'S CONCESSION ON THE AGENCY RECORD ISSUE.

1. In the court below, and in every other FOIA case concerning a prisoner's request for a copy of his presentence report, including several very recent ones, the government has vigorously asserted that the report is not an "agency record" under the FOIA. *Cook v. Willingham, supra; Carson v. Department of Justice, supra; Berry v. Department of Justice, supra; Lindsey v. Bureau of Prisons, supra; Cotner v. United States Parole Commission,* Civil No. 83-1687 (N.D. Tex. Sept. 14, 1983), *appeal pending,* No. 83-1757 (5th Cir.); *Smith v. Flaherty,* 465 F. Supp. 815 (M.D. Pa. 1978). Thus, the Solicitor General's recent concession that the presentence report is an "agency record" is a complete reversal of the government's previous position on this issue. Therefore, since the "agency record" ground was the only basis for the court of appeals' decision in this case, that judgment must be vacated. *See Joseph v. United States,* 405 U.S. 1006 (1972); *Lenhard v. United States,* 405 U.S. 1013 (1972); *Janko v. United States,* 366 U.S. 716 (1961); *Dusky v. United States,* 362 U.S. 402 (1960); *Urrutia v. United States,* 357 U.S. 577 (1958).

In defending its about-face, the government claims that the 1983 amendments to Fed. R. Crim. P. 32 were the basis for its decision to "reassess" its position on the agency record issue. Opposition at 7-8. However, those amendments simply require the sentencing court to ensure that the defendant and his counsel have had an opportunity to read the report before sentencing, and they require the court to transmit findings of inaccuracies to the Parole Commission. 97 F.R.D. 245 (1983). While the Advisory Committee notes acknowledge both the importance of the

report to Parole Commission proceedings and the independent authority of the Commission to disclose the report to the prisoner, 97 F.R.D. at 305-308, this hardly constitutes, as respondent suggests, a recent congressional decision "to remove the basis for reading Rule 32 to require that copies of presentence reports furnished to the Parole Commission be regarded as court documents rather than 'agency records.' " Opposition at 15. Moreover, the 1983 amendments to Rule 32 became effective on April 28, 1983, seven months before the government filed its brief in the court of appeals in this case. 97 F.R.D. at 245. Therefore, notwithstanding the Solicitor General's efforts to paint a picture of intervening circumstances, the government's change in position here represents nothing less than a confession of error.

2. Despite the government's reversal on the agency record issue, the Solicitor General takes the position that no further proceedings are necessary with regard to the petitioner's FOIA request because he has already seen the contents of his report. Opposition at 23. However, under the FOIA a requester is entitled to a copy of any agency record that is not exempt from disclosure. 5 U.S.C. § 552(a). Thus, the mere opportunity to inspect a record does not meet the disclosure requirements of the Act. *See Perry v. Block*, 684 F.2d 121, 124 n.14 (D.C. Cir. 1982).

Moreover, although the Solicitor General attempts to minimize the importance of prisoners being able to obtain copies of their presentence reports, *see* Opposition at 8, 23 & n.12, prisoners have a strong interest in obtaining copies of their reports so that they can scrutinize their accuracy, correct errors and misleading information, and prepare for parole proceedings by being able to anticipate and respond to arguments based on information contained in the reports. *See Berry v. Department of Justice, supra*, 733

F.2d at 1355-56. Indeed, the Parole Commission itself has declared that "it is good correctional practice that a prisoner be given a copy of the presentence report, *to keep* . . . ." Letter from Joseph A. Barry, General Counsel of the Parole Commission (May 5, 1983), included in Appellant's Brief to the First Circuit, Addendum p. 10 (emphasis added). While the Solicitor General suggests that the public at large should not have access to presentence reports, he provides no reasons why petitioner and other prisoners should not receive copies of their own reports.

Therefore, unless the decision below is vacated and remanded, petitioner will be prejudiced by being denied the opportunity to assert his statutory right to obtain a copy of his presentence report. Indeed, a denial of certiorari, which respondent urges, would have the ironic effect that petitioner, whose efforts have resulted in the change in respondent's legal position, would be denied access to his report, while others, who are still litigating in the courts or who may make FOIA requests in the future, may be able to obtain copies of theirs.

3. Finally, the Solicitor General argues that no further proceedings are necessary in this case because the reports can still be withheld in their entirety under various exemptions to the FOIA, in particular, exemption 5. Opposition at 18-19. Significantly, however, the government has not asked this Court to address these arguments on the merits. Therefore, unless this case is remanded for further proceedings, petitioner will have no opportunity to address the government's claims of exemption.

Moreover, respondent's contentions are without merit. First, the government has waived its opportunity to litigate the exemptions by failing to raise them either in the district court or the court of appeals. *See Ryan v. Department of*

Justice, 617 F.2d 781, 792 (D.C. Cir. 1980); *Jordan v. Department of Justice,* 591 F.2d 753, 778-79 (D.C. Cir. 1978) (*en banc*). In addition, because petitioner has already seen the entire contents of his report, the government has specifically waived any otherwise applicable FOIA exemption as a basis for withholding it from him. *See, e.g., N.D. v. Andrus,* 581 F.2d 177, 180-82 (8th Cir. 1978); *Mead Data Central v. Department of Air Force,* 566 F.2d 242, 253, 257-58 (D.C. Cir. 1977).

Finally, although this Court need not, and indeed should not, resolve any matters relating to a claimed exemption since the lower courts have not even considered such claims, the government's exemption 5 claim is inapplicable in this case, where petitioner seeks access to his own presentence report. Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). As the Solicitor General recognizes, Opposition at 19, this Court has held that "[t]he test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." *FTC v. Grolier, Inc.,* 103 S.Ct. 2209, 2214 (1983); *see also United States v. Weber Aircraft Corp.,* 104 S.Ct. 1488, 1493 (1984). Under both Rule 32(c) of the Fed. R. Crim. P. and the Parole Act, 18 U.S.C. § 4208, the prisoner and his attorney are statutorily entitled to review the contents of the report. Therefore, since the "normal" rule at sentencing and parole hearings is that prisoners have a right to review their presentence reports, exemption 5 is simply inapplicable to an FOIA request by a prisoner, including the petitioner, for his own presentence report.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted, and the Court should vacate the judgment below and remand the case to the Court of Appeals for the First Circuit for further proceedings.

Respectfully submitted,

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